

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 Case No.: 2:15-cv-01265-JAD-PAL

4 Eriksen Raul Leiva,

5 Petitioner

6 v.

7 Brian Williams, et al.,

8 Respondents

**Order Denying Motion to Stay Pending  
Exhaustion, and Directing Further Action  
by Petitioner**

[ECF Nos. 17, 18, 19, 20]

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10 Eriksen Raul Leiva petitions under 28 U.S.C. § 2254 for habeas corpus relief from his  
11 2011 state-court conviction for burglary while in possession of a deadly weapon, conspiracy to  
12 commit robbery, robbery with use of a deadly weapon, attempted murder with use of a deadly  
13 weapon, and battery with use of a deadly weapon.<sup>1</sup> I granted respondents' motion to dismiss the  
14 petition in part, concluded that grounds 1(e), 1(f), 2, and 3 are unexhausted, and directed Leiva to  
15 advise how he desires to proceed.<sup>2</sup> Leiva's election was to move for a stay and abeyance under  
16 *Rhines v. Weber* so that he may exhaust the remaining grounds.<sup>3</sup> I find that Leiva has not  
17 demonstrated a basis for a stay and abeyance, deny his motion, and give him until March 23,  
18 2018, to inform this court in a sworn declaration whether he wants to (1) formally and forever  
19 abandon his unexhausted grounds and proceed with this action on the exhausted ones; or (2)  
20 dismiss this petition without prejudice and return to state court to exhaust his unexhausted  
21 claims.

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25 <sup>1</sup> ECF No. 3.

26 <sup>2</sup> ECF No. 16.

27 <sup>3</sup> ECF No. 17. Respondents opposed (ECF No. 21), and Leiva replied (ECF No. 22).  
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## Discussion

In *Rhines v. Weber*,<sup>4</sup> the United States Supreme Court limited the district courts' discretion to allow habeas petitioners to return to state court to exhaust claims. When a petitioner pleads both exhausted and unexhausted claims—known as a mixed petition—the district court may stay the petition to allow the petitioner to return to state court to exhaust the unexhausted ones only if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics.<sup>5</sup> “[G]ood cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify [the failure to exhaust a claim in state court].”<sup>6</sup> “While a bald assertion cannot amount to a showing of good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure to exhaust, will.”<sup>7</sup> The Supreme Court’s opinion in *Pace v. DiGuglielmo*,<sup>8</sup> suggests that this standard is not particularly stringent, as the High Court held that “[a] petitioner’s reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ to excuse his failure to exhaust.”<sup>9</sup>

In my February 13, 2017, order, I found four of Leiva’s grounds unexhausted: two ineffective-assistance-of-trial counsel claims, a claim of ineffective appellate counsel, and three claims of trial-court error.<sup>10</sup> Leiva argues that he can demonstrate good cause for failure to

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<sup>4</sup> *Rhines v. Weber*, 544 U.S. 269 (2005).

<sup>5</sup> *Id.* at 277; *Gonzalez v. Wong*, 667 F.3d 965, 977–80 (9th Cir. 2011).

<sup>6</sup> *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014).

<sup>7</sup> *Id.*

<sup>8</sup> *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

<sup>9</sup> *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). *See also Jackson v. Roe*, 425 F.3d 654, 661–62 (9th Cir. 2005) (the application of an “extraordinary circumstances” standard does not comport with the “good cause” standard prescribed by *Rhines*).

<sup>10</sup> *See* ECF Nos. 3, 16 (identifying these grounds: (1) ground 1(E): trial counsel failed to object to a witness testifying regarding an out-of-court identification; (2) ground 1(F): trial counsel

1 exhaust these claims because his state postconviction counsel was ineffective for failing to raise  
2 them.<sup>11</sup>

3 The Ninth Circuit recognized in *Blake v. Baker* that a showing of ineffective assistance of  
4 postconviction counsel, in line with *Martinez v. Ryan*,<sup>12</sup> may serve as good cause, but the  
5 petitioner must provide evidence to support the underlying theory of ineffective assistance of  
6 counsel.<sup>13</sup> *Martinez* “forge[d] a new path for habeas counsel to use ineffectiveness of state  
7 [postconviction relief] counsel as a way to overcome procedural default in federal habeas  
8 proceedings.”<sup>14</sup> It created a narrow exception to the general rule that errors of postconviction  
9 counsel cannot provide cause for a procedural default.<sup>15</sup> But the *Martinez* exception applies only  
10 to substantial claims of ineffective assistance of trial counsel; it cannot supply cause to excuse  
11 the procedural default of a substantive claim of trial-court error<sup>16</sup> or ineffective assistance of  
12 appellate counsel.<sup>17</sup>

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15 failed to investigate and make a “*Brady* request” regarding fingerprints from the sliding glass  
16 door and the handle of a bat; (3) ground 2: appellate counsel rendered ineffective assistance in  
17 violation of his Sixth Amendment rights; and (4) ground 3: Leiva’s Fourteenth Amendment  
18 rights to due process and a fair trial were violated because (a) the trial court should have “taken  
19 notice of trial counsel’s lack of objection under the Confrontation Clause; (b) the trial court  
20 should have “taken notice and cautioned trial counsel of a possible confrontation violation”; and  
21 (c) the trial court failed to consider jury instruction no. 8 regarding witness credibility).

22 <sup>11</sup> ECF No. 17.

23 <sup>12</sup> *Martinez v. Ryan*, 566 U.S. 1 (2012).

24 <sup>13</sup> *Blake*, 745 F.3d at 982–984.

25 <sup>14</sup> *Lopez v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012).

26 <sup>15</sup> *Martinez*, 566 U.S. at 16–17.

27 <sup>16</sup> *See id.*

28 <sup>17</sup> *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017).

1       Leiva's unexhausted claims consist of two trial IAC claims, a claim of appellate IAC, and  
2 three claims of trial-court error.<sup>18</sup> Because *Martinez* can only save claims of trial IAC, it offers  
3 no help to Leiva's claims of trial-court error and ineffective assistance of appellate counsel. So,  
4 at best, *Blake* and *Martinez* could potentially assist only Leiva's trial IAC claims.

5       But Leiva has not demonstrated that these claims are potentially meritorious. A jury  
6 found Leiva guilty of several counts, including attempted murder and battery with a deadly  
7 weapon.<sup>19</sup> Leiva appears to assert in ground 1(e) that trial counsel was ineffective for failing to  
8 object to the out-of-court identification when a police detective testified at trial that Brigitte  
9 Harden told him that Leiva was her boyfriend and that his name was Eric Fuentes.<sup>20</sup>  
10 Respondents point out that, even assuming that there were some basis to object and no  
11 reasonably strategic reason for counsel not to, Leiva fails to show that there is a reasonable  
12 probability of a different outcome at trial in the absence of the testimony. Leiva's defense was  
13 not based on his identity: he claimed instead that he acted in self-defense after the victim hit him  
14 with a baseball bat.<sup>21</sup> Plus, the victim identified Leiva at trial.<sup>22</sup>

15       In ground 1(f), Leiva claims that trial counsel failed to investigate and make a "*Brady*  
16 request" regarding fingerprints from the sliding-glass door and the handle of a bat. Leiva argues  
17 that the fingerprint evidence would show that the victim hit Leiva first with the baseball bat. The  
18 State has a duty to turn over evidence that is favorable to the defense.<sup>23</sup> To prove a violation of  
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20 <sup>18</sup> See *supra* note 10.

21 <sup>19</sup> Exh. 28. Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF  
22 No. 8, and are found at ECF Nos. 9–14.

23 <sup>20</sup> ECF No. 3 at 5; Exh. 25 at 158.

24 <sup>21</sup> See, e.g., Exh. 23 at 39 (defense opening statement); Exh. 67 at 8 (state district court  
25 concluded that the defense advanced three logical defenses: mutual combat, self defense and heat  
26 of passion).

27 <sup>22</sup> Exh. 23 at 82.

28 <sup>23</sup> See *Strickler v. Green*, 527 U.S. 263, 280 (1999).

1 this duty that violates due process under *Brady* and its progeny, a petitioner must show that the  
2 evidence was favorable to the accused, either because it is exculpatory, or because it is  
3 impeaching; the State suppressed the evidence, either willfully or inadvertently; and prejudice  
4 resulted.<sup>24</sup> Prejudice—often referred to as materiality—is established by showing “that ‘there is  
5 a reasonable probability’ that the result of the trial would have been different if the suppressed  
6 [evidence] had been disclosed to the defense.”<sup>25</sup>

7 Leiva does not argue that any such fingerprint evidence exists.<sup>26</sup> Besides, it would have  
8 established only that the victim held the bat at some point. But Leiva acknowledges in his  
9 petition that his co-defendant asserted that the victim grabbed the bat.<sup>27</sup> And, as respondents  
10 note, such fingerprint evidence would only have reaffirmed an undisputed fact at trial. Leiva has  
11 not shown a reasonable probability of a different outcome at trial, and any fingerprint evidence  
12 was not material under *Brady*. So, I conclude that Leiva has failed to show that the trial-counsel  
13 IAC claims in grounds 1(e) and 1(F) are potentially meritorious.

14 In sum, Leiva has failed to demonstrate a basis for a stay and abeyance, so I deny the  
15 motion. Leiva now has until March 23, 2018, to file a sworn declaration informing this court  
16 whether he wants to (1) formally and forever abandon the unexhausted grounds for relief in this  
17 petition and proceed on the exhausted grounds; OR (2) dismiss this petition without prejudice  
18 and to return to state court to exhaust his unexhausted claims.

### 19 Conclusion

20 IT IS THEREFORE ORDERED that petitioner’s motion for stay and abeyance [ECF No.  
21 17] is **DENIED**;

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24 <sup>24</sup> *Id.* 281–82.

25 <sup>25</sup> *Id.* at 289.


26 <sup>26</sup> *See Blake*, 745 F.3d at 982–984.

27 <sup>27</sup> ECF No. 3 at 4. *See also* Exh. 48 (Nevada Supreme Court order affirming the conviction and  
28 noting that the victim attempted to defend himself with a baseball bat).

1 IT IS FURTHER ORDERED that **petitioner has until March 23, 2018, to file a sworn**  
2 **declaration informing this court whether he wants to (1) formally and forever abandon the**  
3 **unexhausted grounds for relief in this petition and proceed on the exhausted grounds; OR**  
4 **(2) dismiss this petition without prejudice and to return to state court to exhaust his**  
5 **unexhausted claims.** If petitioner elects to abandon his unexhausted grounds, respondents will  
6 have 30 days from the date that petitioner serves his declaration of abandonment to file an  
7 answer to his remaining grounds for relief. The answer must contain all substantive and  
8 procedural arguments for all surviving grounds of the petition and comply with Rule 5 of the  
9 Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254.  
10 Petitioner will then have 30 days after service of respondents' answer to file a reply.

11 IT IS FURTHER ORDERED that respondents' three motions for extension of time to file  
12 a response to the motion to stay [ECF Nos. 18, 19, 20] are **GRANTED *nunc pro tunc*.**

13 Dated February 22, 2018

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16 U.S. District Judge Jennifer A. Dorsey  
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